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TESTIMONY OF RICHARD D. MILLER
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BEFORE THE

COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY & CLAIMS
U.S. HOUSE OF REPRESENTATIVES

THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT: ARE WE FULFILLING THE PROMISE WE MADE TO THESE VETERANS OF THE COLD WAR WHEN WE CREATED THE PROGRAM?

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OVERSIGHT HEARING #4

NOVEMBER 15, 2006

Summary of Testimony
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Congress enacted Special Exposure Cohort (SEC) provisions under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), P.L. 106-398, to provide claimants with a presumption that their cancer was work related and should be compensated in cases where radiation exposure records were missing, incomplete or altered, or workers were not monitored for the radiation hazards to which they were exposed. Claimants may petition to be added to the SEC, if they can demonstrate that "it is not feasible to estimate radiation dose with sufficient accuracy."

The OMB's "Passback" to DOL for the FY 07 budget outlines 5 options to reduce the approval of SECs as a way to contain the growth in the cost of benefits under EEOICPA. The Passback calls for OMB clearance of SECs; changing the balance in the Advisory Board on Radiation and Worker Health (ABRWH); imposing constraints on the board's audit contractor; and securing additional external reviews of NIOSH work products.

DOL maintains that "cost containment is not part of any strategy or involvement that the Department of Labor has had in this process."

However, excerpts of documents provided by the House Judiciary Committee indicate that the Department of Labor (DOL) developed the specific mechanisms which were embodied in the OMB's Passback. DOL has criticized details of nearly all proposed SECs in an effort to reduce benefits, and sought to impose hurdles in the HHS regulations governing SEC petitions to make it more difficult to qualify.

DOL has injected its cost containment agenda into the dose reconstruction process as well. Starting in October 2005, DOL staff started culling out compensable dose reconstruction cases which involve "infrequently" compensated types of cancers, due to unexplained "management concerns." When compensable cases were found, DOL had its Final Adjudicative Branch remand cases back to NIOSH to be "reworked," but without explaining the rationale to claimants. The FAB lacks sufficient independence from DOL program officials, and reforms should be implemented.

The composition of the Advisory Board on Radiation and Worker Health is not in compliance with the requirements of EEOICPA, despite repeated efforts to secure Administration cooperation. EEOICPA requires a balance of medical, scientific and worker perspectives. At present this 12 member board has only 2 of 4 worker representatives and only 2 of 4 medical professionals. The Board is not balanced in perspectives, as required by the Federal Advisory Committee Act. Congress should amend EEOICPA to provide for Congress to appoint the Advisory Board members.

Beginning November 3, 2006, the Advisory Board's audit contractor has been cut off from access to files needed for audits by NIOSH program staff. Legislation is needed to ensure that Board and its contractor have full and unfettered access to this data needed for audits and SEC petition reviews.

I am Richard Miller, a Senior Policy Analyst with the Government Accountability Project ("GAP"), a non profit organization based in Washington, D.C. In addition to whistleblower advocacy, GAP's work includes the oversight of the three agencies implementing EEOICPA. GAP serves as an information hub for claimants, Congress, workers and the media. GAP assisted with the EEOICPA reform amendments which were included in the FY 05 Defense Authorization Act (P.L.108-375). Prior to working at GAP, I was a staff representative for DOE atomic weapons employees, and worked on the bi-partisan effort to enact EEOICPA[1] as part of the FY 01 Defense Authorization Act (P.L.106-398).

Today, my testimony will underscore new challenges facing the program since I last testified 8 months ago, and compare reality with the testimony provided to this Subcommittee by the Department of Labor (DOL) and the Office of Management and Budget (OMB) witnesses regarding the FY 2007 OMB Passback. The Passback outlined 5 options to constrain the number of new Special Exposure Cohorts (SEC) and otherwise limit benefit payments under the law. These options would circumvent the legal authorities assigned to both the Advisory Board on Radiation and Worker Health (ABRWH) and the Secretary of Health and Human Services (HHS), and deprive claimants of due process.

I. BACKGROUND ON THE REASON FOR SPECIAL EXPOSURE COHORTS IN THE EEOICPA

Congress included opportunities for claimants to petition to be members of the SEC to ensure that those workers employed in nuclear weapons factories who were unmonitored or inadequately monitored for occupational exposure to ionizing radiation would not face the insurmountable hurdle of establishing their radiation dose to prove their claim for cancer. Congress created this safety valve because there was ample evidence that radiation exposure records were missing, incomplete, unreliable or altered, and that many workers were not adequately monitored for the radiation hazards to which they were exposed.

If designated a member of the SEC, claimants with one of 22 specified cancers listed in EEOICPA and who worked at least 250 days during the covered time period for the SEC, are entitled to presumptive compensation of $150,000 lump sum plus prospective medical benefits for the covered illness. As members of the SEC, claimants would not require a radiation dose

[1] *See*: Testimony of Richard Miller before the Senate HELP Committee, Subcommittee on Employment, Safety & Training, May 15, 2000; the House Judiciary Committee, Subcommittee on Immigration & Claims (http://www.house.gov/judiciary/mill0921.htm) on September 21, 2000 and March 1, 2006; and the Senate Energy Committee, November 21, 2003 (S. Hrg. Report 108-334)

estimate to determine if their claim would qualify for compensation. Presumptive benefits are common in radiation compensation programs: claimants under the Radiation Exposure Compensation Act and the Atomic Veterans Act are presumptively eligible for listed cancers.

The process for adding new groups of workers to the SEC requires: (1) a NIOSH staff "Evaluation Report" and a recommendation for approval or denial, which is sent to the ABRWH, (2) an Advisory Board review of the NIOSH evaluation report in public, on-the-record proceedings, (3) a decision by the Secretary of HHS to approve or deny a petition, and (4) a 30-day "Congressional Notice and Review" the Secretary's final decision (pursuant to 42 U.S.C. 7384l(14)(C)(ii)). Denials by the Secretary of HHS may be appealed to a review panel established by the Secretary.

II. CBO SCORING ON ADMINISTRATIVELY ADDED SECS

The Congressional Budget Office, when it scored EEOICPA in 2000, did not estimate a cost for designating additional SECs--beyond the initial 4 sites in Ohio, Kentucky, Tennessee and Alaska, which were mandated when EEOICPA was enacted in 2000. There was no basis for developing a cost estimate for the extent of missing records. To ensure budget and scientific control over unwarranted additions to the SEC, all SEC designations are transmitted to Congressional committees of jurisdiction, who can hold hearings or legislatively block such additional SEC designations.

During the Congressional "Notice and Review" process, DOL has never presented a case against a particular SEC, nor has it issued any public analyses of why the Advisory Board and the HHS Secretary are in error on any specific SEC designation. DOL's reputation for fairness has been tainted by its aggressive efforts to undermine a key element of EEOICPA outside of public view.

III. DOL TESTIMONY CONTRADICTED BY EVIDENCE OF QUIET CAMPAIGN TO REDUCE EEOICPA BENEFITS

DOL publicly states that they do not have a vested interest in the outcome of any SEC Petition or the deliberations of the Advisory Board, but evidence shows that DOL has quietly gone to the Office of Management and Budget (OMB) with shrill warnings about adverse precedents set by SECs that were approved for Mallinckrodt Chemical (1949-1957) in Missouri and the Iowa Army Ammunition Plant in Burlington, Iowa. The Director of the DOL's Office of Worker Compensation Programs (OWCP) warned OMB that the precedent set by these

approvals were going to open the floodgates and projected that this will lead to a vast expansion of benefit costs "approaching $7 billion." This prediction has not panned out; new SECs constitute only about 10% of the claims approved to date.

Nonetheless, OMB responded positively. Excerpts of notes taken by the Judiciary Committee staff regarding an October 5, 2005 e-mail from OMB to the OWCP Director state:

> "Thanks Shelby, we share your concerns. If there are any programmatic reforms—legislative, administrative, regulatory, you name it—that we could potentially tee up for our policy officials, we're all ears. At this point, nothing should be ruled out. These would be OMB ideas, not DOL ideas. My bosses typically expect the identification of a problem to be accompanied by options to solve it. Legislation options are not first option, because they are hard to get enacted."

The resulting options subsequently outlined by DOL and transmitted to OMB were written into the FY 07 OMB "Passback" to the DOL. The Passback states:

- ***Energy Employees Occupational Illness Compensation Program Act (EEOICPA) Part B.*** *ESA[2] is to be commended for identifying the potential for a large expansion of EEOICPA Part B benefits through the designation of Special Exposure Cohorts (SEC). The Administration will convene a White House-led interagency work group including HHS and Energy to develop options for administrative procedures to contain growth in the cost of benefits provided by the program. Discussions are not limited to, but will involve, the following five options.*

    1. *Require Administration clearance of SEC determination[s];*
    2. *Address any imbalance in membership of President's Advisory Board on Radiation and Worker Health;*
    3. *Require an expedited review by outside experts of SEC recommendations by NIOSH;*
    4. *Require NIOSH to apply "conflict of interest" rules and constraints to the Advisory Board's contractor; and*
    5. *Require that NIOSH demonstrate that its site profiles and other dose reconstruction guidance are balance[d].*

IV. DOL DRAFTED OMB PASSBACK OPTIONS TO AS A WAY TO CONTAIN BENEFIT COSTS

In his March 1, 2006 testimony before this Subcommittee, Shelby Hallmark, OWCP Director, responded to questions from the Chair about the role of DOL in developing the OMB Passback:

[2] ESA is the Employment Standards Administration within the DOL. The Office of Workers' Compensation Programs (OWCP) which administers EEOICPA is part of ESA.

> "Well, Mr. Chairman, as I said, cost containment is not part of any strategy or involvement that the Department of Labor has had in this process."

When the Chair pressed the question of who developed the OMB Passback, Mr. Hallmark responded:

> "It wouldn't be appropriate for me to discussion the internal deliberations about budget, which are always out of the general discussion, but that's part of my role."

This Subcommittee's oversight appears to have resolved that question.

Mr. Hallmark's statement that DOL had no interest in cost containment is at odds with the excerpts of DOL e-mails and memos made available to me by the Judiciary Committee in preparing for this hearing. For example, notes taken by Judiciary Committee staff of a DOL memo apparently under preparation for OMB states:

- "The single most effective way to prevent billions of dollars {in spending} is by requiring HHS to clear its determinations to add additional employees to the SEC with the OMB after an opportunity for interested agencies, such as the DOL to comment on the analysis and determination. DOL has unsuccessfully requested an opportunity to review the HHS analysis and determination of SEC petitions. While recognizing that Congress provided an unreasonably short deadline of 30 days from receipt of a recommendation of the Advisory Board on Radiation and Worker Health for HHS to act, we still believe OMB clearance is crucial to preventing unjustified admission to several of the recent petitions considered by the Advisory Board.

Further evidence of DOL's active efforts to reduce costs of benefits involves the HHS proposed rules for petitioning HHS to designate additional SECs. Excerpts of emails provided by the Subcommittee state that:

- DOL urged NIOSH to propose SECs where claimants would be compensated for as few as 1 cancers, even though Congress required that all SEC members are compensated for any of the 22 cancers listed in the law. Mr. Hallmark complained that the Advisory Board rejected this approach. He said "Did NIOSH not do any selling on this?" … "Allowing the Board to go against this makes for a steep climb in the final rule." An excerpt of another DOL e-mail says, "We should keep a close eye on these issues so that NIOSH does just fold on them." DOL urged NIOSH to adopt a test for determining "health endangerment" that would require estimating cancer risk from radiation exposure, even though the whole reason to designate an SEC is that radiation dose could not be estimated with sufficient accuracy. Fortunately, the Advisory Board rejected this DOL-recommended approach because it posed insurmountable hurdles for claimants and was infeasible to implement.

- DOL opposed legislation to clarify NIOSH criteria for designating SECs that was introduced by Senators Clinton and Schumer. In an excerpt of an e-mail, Shelby

Hallmark says: "This would be a massive SEC expansion. Hopefully it has no chance of moving, but given the recent Senators' letter and other wacky happenings, I am not sure we can afford to simply ignore it." The same cost driven posture was taken on site specific SEC bills covering facilities in Iowa, Missouri, New York, and Colorado. In another e-mail excerpt, Hallmark says: "We should do everything possible to oppose these SEC amendments." In none of these cases does he assess whether there is a meritorious case for an SEC, or whether the NIOSH rule is so subjective that legislation might be in order to provide clearer criteria for who should or should not qualify for an SEC when data is lacking. His entire logic is budget driven.

- DOL has disparaged the Advisory Board on Radiation and Worker Health, and urged a change in the composition of the Board so that it would recommend more SEC denials. An excerpt of notes taken by Judiciary Committee staff of a DOL memo under preparation for OMB states: "the Advisory Board has totally failed to take a balanced approach to examining NIOSH activities. Nearly all of its members have operated as unwavering advocates of any action that would expand benefits, while the remaining members occasionally raise dissenting views but are unwilling to forcefully advocate any position likely to upset the claimant community. This unwillingness to fulfill their statutory responsibility by carefully examining issues such as whether so called "claimant-friendly" devices increasingly adopted by NIOSH are overestimating and overcompensating claimants has been magnified by NIOSH's decision to provide technical support through a contractor, Sanford Cohen & Associates (SC&A) rather than through its own staff. SC&A has relentlessly pursued an agenda that appears to be designed to result in maximizing payments to claimants regardless of scientific validity."

DOL's suggestion that the NIOSH program staff should be serving as the technical support staff for the Advisory Board's audit activities would result in a significant conflict of roles. It would also undermine the Congressionally-mandated independence of the Board's review of SEC and the dose reconstruction process. This DOL suggestion is geared to weaken the independence of the Board's oversight, which is all the more imperative--given the plethora of conflicts of interest which have infected this program as a result of NIOSH hiring DOE and DOE contractors to run the dose reconstruction program. NIOSH circumvented the spirit of Congressional restrictions that prohibit DOE from performing dose reconstructions (42 U.S.C. 7384n). Instead, NIOSH hired DOE contractors and consultants, many of whom worked at DOE sites and have conflicts of interest. These conflicts underscore the imperative that the Board be supported by individuals independent of NIOSH (and the DOE).

- In an October 2005 memo prepared for OMB, DOL recommended that the Advisory Board be "refreshed." The draft communications states: "A number of Advisory Board member's terms have expired…We believe replacing these members could provide an opportunity to add Board members willing and able to advocate a scientifically valid approach to carrying out NIOSH's responsibilities under EEOICPA." DOL does not

explain what it means by "scientifically valid." Given its stated agenda to reduce the number of SECs, this appears to be a simple case of "packing the courts" to oppose added SEC designations dressed up as "scientific validity."

- Excerpts from an October 5, 2005 communication to OMB and senior DOL political officials, Hallmark pointed to a press release from Senator Maria Cantwell, who flagged data inadequacies at Hanford as evidence for a partial SEC, based on findings in an SC&A audit report. Hallmark asserts that evaluations by the Board's audit contractors lead to a "lopsided and extreme exaggerations of radiation dose." Hallmark argues that "the Advisory Board has allowed, even encouraged SC&A to pursue this unbalanced course, and NIOSH has shown no willingness to stand up to it, and recently doesn't even try to refute SC&A's more outlandish assertions. This is not the slippery slope, it is the expert downhill chute."

Mr. Hallmark's words from the March 1 hearing—"cost containment is not part of any strategy or involvement that the Department of Labor has had in this process"-- are plainly contradicted by the actions of DOL in promoting the policy options in the OMB Passback and opposing legislation to improve the program. DOL's credibility as an impartial claims administrator has been undermined by the actions of key officials.

Hiding behind generalizations, (e.g., NIOSH's criteria is "fuzzy"), Hallmark has failed to document a single specific technical error in designating an SEC. Moreover, he does not account for a 6-step comment resolution process overseen by the Board members and the public that has resulted in NIOSH and SC&A/Board reaching mutual agreement on technical issues, while identifying major omissions in NIOSH site profiles and SEC evaluations. Mr. Hallmark seems unwilling to recognize that there is a case for a robust Board-led peer review process. NIOSH is breaking a lot of new ground, mistakes are likely because they are speeding up the process to deal with a large claims backlog, and the program is being operated by a closed community of health physicists, most of whom have conflicts of interest from managing health physics programs at these DOE sites. Hallmark sees no need for a strong scientific peer review to counterbalance these conflicts. DOL supported an NAS review where they planned to "steer the work plan" and use the results to "defend our decisions."

It is a credit to the integrity of the process that the Secretary of HHS has followed the advice of the Advisory Board on SECs based on the deliberations contained in the transcript of the administrative record, rather than uncritically accepting the advice of the NIOSH program staff or the hysterical allegations of the DOL.

The Advisory Board has operated as an independent enterprise applying due diligence in a considered manner. NIOSH Director John Howard described the importance of the Board ensuring a credible peer review in his March 1 testimony before this Subcommittee. Denise Brock, a claimant, underscored the importance of the Advisory Board in providing a public forum for debating the technical and policy issues involved in an SEC in her July 20, 2006 hearing before this Subcommittee.

For example, to deal with the knotty issue of estimating radiation doses from raffinates (actinium, protactinium and thorium) that were never monitored at Mallinckrodt in St. Louis, the Advisory Board requested 4 audit reports over 2 years, and then evaluated NIOSH's responses to the audit reports at 4 Board meetings, 4 additional subcommittee meetings and numerous conference calls. In the case of the Iowa Army Ammunition Plant, NIOSH conceded there were no internal radiation dose records, and the Board deliberations exposed the fact that the scant external radiation dose records were not representative of the most exposed workers. To rely on these unrepresentative records will cause radiation dose to be underestimated for unmonitored workers. The vote for the Iowa SEC was unanimous. The system of checks and balances, which was put into place at the recommendation of the GAO, is a gossamer thin thread which is tenuously holding this program together.

V. OMB DISAVOWS OMB PASSBACK, BUT FAILS TO ENSURE THAT DOL COMPLIANCE

Austin Smythe, Acting Deputy Director of the OMB, testified before the Subcommittee on July 20, 2006 that the Administration was not implementing any of the options in the OMB Passback. He stated:

> "We are not pursuing any of these items that were listed. It was inappropriately leaked. It has now been inappropriately characterized as Administration Policy, which it is not."

The Chair asked whether the OMB Passback represented Administration policy. Mr. Smythe responded:

> "A Passback, just to give the subcommittee background—there is a process that we use to put together the budget. That process begins in September when the agencies submit to us their proposals, and all of their proposals in terms of what they want to do in the budget.
>
> "We review those proposals in the October time frame and sometime, usually in late November we pass back our proposals back to them. It doesn't represent—the agency's

> submissions to us don't represent administration policy and our Passback to them does not represent administration policy."
>
> "This is a very rigorous process where we go through various options and so forth. In this instance, none of these options were accepted in terms of what the president's ultimate policy was and what was in the president's budget."

Despite Mr. Smythe's testimony that the OMB Passback does not represent administration policy, the OMB Passback was put on the agenda for a joint NIOSH-DOL meeting held on January 4, 2006. Excerpts of communications between NIOSH and DOL raised the question of whether certain policies to limit the years of coverage at the Linde facility in New York arose out the cost containment goals encompassed in the OMB Passback.

There is also concern that Mr. Hallmark moved forward with a sequel to the Passback to impose additional controls on HHS or NIOSH. Notes taken by the Judiciary Committee staff from materials which DOL would allow it to view but not duplicate, identified an early February 2006 e-mail communication from Shelby Hallmark to Melissa Benton at OMB. It indicates that Mr. Hallmark has developed a briefing paper which outlines additional policy options for dealing with NIOSH and HHS. The email to OMB says:

> "I am uncomfortable with even an unofficial sharing of my briefing piece for today's meeting with my second floor people [Secretary's office], since I am not at all convinced they will be willing to argue directly for any or all the actions it proposes, and I know they are very reluctant to be on the cutting edge of this argument. I feel pretty sure their response is going to be: 'OMB such [sic] be holding HHS accountable here – DOL isn't in any position to try to do that.'
>
> But if you promise not to spread it, and if you don't use the language in your documents such that NIOSH will know where the verbiage came from, I'll share it (I'm still smarting from your … citation of the ideas in the budget passback as having been suggested by ESA). Is that agreeable?"

We would urge the Subcommittee to secure the "briefing paper" and ascertain its implementation status, since it appears to represent another benefits reduction initiative.

VI. "INCREASING MANAGEMENT CONCERN" DRIVES SECRET DOL REVIEW OF COMPENSABLE CASES FOR REMAND TO NIOSH

DOL's benefits containment agenda has found its way into a sensitive, non-public review of certain dose reconstruction (DR) claims. Beginning in October 2005, DOL began sending certain compensable claims back to NIOSH "based on increasing [DOL] management concern

over a potential increase in compensable claims for cancers perceived as normally/previously non compensable," according to excerpts of documents provided by the Judiciary Committee. DOL staff health physicists began dissecting NIOSH dose reconstructions which had a probability of causation over 50% (e.g., they were compensable). In response to requests from the DOL program officials, the Final Adjudication Branch remanded some cases back to NIOSH without ever telling claimants their case was being reviewed because DOL headquarters was second guessing NIOSH dose reconstructions. One DOL e-mail excerpt says:

> "When we send remand orders to claimants, I don't want them to know they are part of a management plan."

To the extent there are factual errors, such as work history or incorrect cancer diagnoses that are within the ambit of DOL regulations, then DOL has a role in remanding cases back to NIOSH. However, DOL singled out whole category compensable claims in the hope of getting NIOSH to reduce the radiation dose and bring the claim under 50% probability of causation—which would lead to a denial.

An internal DOL e-mail by a health physicist concedes that NIOSH dose reconstructions have not been over-estimating radiation dose. It states:

> "Now that I think about it, most of the DRs for the "special cancers" we are reviewing that result in a POC of >50% are appropriately performed by NIOSH (no rework required).

The need for maintaining secrecy seems to be a concern. This DOL e-mail added:

> "I hope no one is mentioning the fact that we took another look at these DRs and said it was fine—in the recommended or final decisions."

Some of the cases that were selected by DOL involved glove box workers at the Rocky Flats and Savannah River sites. Glove boxes, which provided an inert environment for working on pyrophoric metals such as plutonium, were not adequately shielded for many years. Film badge readings did not necessary capture the neutron dose from leaky glove boxes, since the badges were not positioned near the parts of the glove boxes that leaked radiation. If DOL has a problem with the model used by NIOSH for glove box workers, they should be raising this issue with NIOSH staff and the Advisory Board on Radiation and Worker Health in a public forum—not as part of a secret "management plan." The Advisory Board has the statutory authority to

review scientific issues related to radiation dose reconstruction methods. However, DOL seems intent on circumventing the Board, if it cannot control it.

In an ironic twist, DOL regulations will not permit claimants the right to challenge NIOSH dose estimation methods in their administrative appeals, but DOL has granted itself this authority as part of an undisclosed initiative.

It appears that the neutrality of the DOL's Final Adjudicative Branch (FAB) has been used to advance the Administration's cost containment goals. Further investigation is necessary. If the Chief of the FAB is obligated to compromise her adjudicative independence, then perhaps there is a needed for legislative reforms to separate the FAB from the control by program officials and OMB. The appeals body for the Black Lung Program and the Longshore and Harbor Workers Act—the Benefits Review Board--is a separate adjudicative entity within the DOL and may be an appropriate model to replicate.

VII. IMBALANCE IN COMPOSITION OF ADVISORY BOARD THREATENS CHECKS AND BALANCES: LEGISLATIVE ACTION NEEDED

The OMB Passback called for "addressing any imbalance in membership of President's Advisory Board on Radiation and Worker Health." The composition of the Board is not in compliance with EEOICPA (42 U.S.C. 7384o) which requires a balance of scientific, medical and worker perspectives." Today, the 12 member Board only has 2 of the 4 required worker representatives. Likewise, the Board only has 2 of 4 medical representatives. This Advisory Board, which plays a critical role in overseeing this program and providing a check and balance, also lacks the balance and diversity of viewpoints that is called for under the Federal Advisory Committee Act.

Chairman James Sensenbrenner wrote to the President about the need for ensuring balance and independence on the Advisory Board. His June 9, 2005 letter said:

> *"New appointments, and the discharging of current members, may negatively affect the Board's balance and independence, thus compromising the Board's ability to fulfill its mandates under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA)."*
>
> *"Every attempt must be made to assure the Board appointees are independent of NIOSH's program, its contractors, the Department of Energy (DOE) and the Labor Department, inasmuch as the Board is tasked with an independent audit function. Specifically, 42 U.S.C. 7384(n) provides that 'the President shall*

> *establish an independent review process using the Advisory Board on Radiation and Worker Health' to assess methods used for dose reconstruction and verify dose estimates. If [NIOSH] OCAS staff provided the list of candidates to the White House, an appearance of conflict arises, as it is they who will be the subject of the Board's audit. Hopefully, a direct dialogue between the White House and Congress can resolve this problem."*

New Board Members were added in early 2006 who were recruited by the NIOSH program staff whose work is being audited. This is an inherent conflict. The son of one of the new Board members works as a subcontractor on the NIOSH radiation dose reconstruction program. The change in balance of the Advisory Board which had been called for by DOL and included in the OMB Passback has been achieved. Subsequent communications have followed from a bipartisan group of Members from the New Mexico, Washington, Iowa and Illinois delegation which urged the White House to balance the Board with new appointments. These communications and communications from this Subcommittee appear to have had no discernable effect.

Given the apparent unwillingness of the Administration to comply with EEOICPA, we recommend that Congress enact legislation to shift the appointing authority from the President to Congress—which would make appointments on a bipartisan basis. The Energy Employees Occupational Illness Program Improvement Act of 2006 (HR 5840), which was introduced by the Ranking Member, outlines a plan to have Congress assume this responsibility.

VIII. NIOSH INTERFERENCE WITH THE WORK OF THE ADVISORY BOARD AND ITS AUDIT CONTRACTOR

On November 3, 2006, NIOSH Compensation Program Director Larry Elliott unilaterally suspended all access by the Advisory Board and its audit contractor to the claimant data base. This action followed an audit report on data completeness related to the Rocky Flats SEC petition, because he and the NIOSH lawyers were concerned over 1) the possible inclusion of a non-adjudicated claim in the data review (none were included); and 2) the possibility that the identity of a claimant could be "back extrapolated" by combining the data parameters. All members of the Board and audit staff have been authorized to have access to Privacy Act protected records and received the requisite training.

At the Advisory Board's workgroup meeting on November 6, 2006, Mr. Elliott indicated that assuring Privacy Act requirements were being protected fell to him as the Manager of the System

of Records. Further, he said he intended to restore access to the Advisory Board, but would provide data to the audit contractor only when provided with a specific request for access to certain files and an explanation why they are needed. As of November 13, two days before this hearing, Advisory Board access to the electronic data base of records was reinstated (although the constraints are unknown); however, the Board's audit contractor is still restricted.

A November 13, 2006 communication from Mr. Elliott to the Board states:

> "Access of NOCTS claim files by SC&A (or any contract entity) must be granted on a case-by-case basis with an established purpose as authorized by the Manager of the System of Records."

This raises practical as well as policy concerns. How can the Board and the audit contractor effectively communicate if they have varying access clearances? Can the Board's audit contractor perform adequately, if NIOSH has access to data that is withheld from the audit contractor?

Mr. Elliott, as the manager of the program being audited, is using his additional legal authority as Manager of the System of Records to demand that the Board's audit contractor justify each and every request for data. This allows Mr. Elliot to impact the scope, depth and breadth of the audit, and impair the efficiency of the audit contractor. Mr. Elliott's actions raise questions about the degree to which there is a conflict of roles, and whether there whether there needs to be a non-conflicted entity ensuring access to all records for purposes of the Board's efforts auditing the NIOSH program and evaluating SEC petitions.

Mr. Elliot was removed as the designated federal official for the Advisory Board due his conflict of roles as manager of the dose reconstruction program and controlling the activities of the Board which was auditing his program. The GAO's recent report on the Advisory Board[3] warned NIOSH to be alert for conflict of roles in managing this program.

> "The roles of certain key federal officials initially involved in the advisory board's review of the dose reconstructions may not have been sufficiently independent and actions were taken to replace these officials. Nonetheless, continued diligence by HHS is required to prevent such problems from recurring…"

[3] *ENERGY EMPLOYEES COMPENSATION: Adjustments Made to Contracted Review Process, But Additional Oversight and Planning Would Aid the Advisory Board in Meeting Its Statutory Responsibilities,* February 2006, GAO-06-177, pp. 3

Legislation may be required to ensure that the Advisory Board and the audit contractor have full and unfettered access to all files necessary to carry out their responsibilities under EEOICPA, consistent with the Privacy Act, and without interference from NIOSH Program staff.

IX. SUMMARY

We urge the Subcommittee to continue its oversight on problems with this program. Subtitle E has not been examined, and also needs a detailed review. We would urge the Subcommittee to take all necessary actions to secure the records that were withheld by the DOL and HHS. We recommend that the briefing papers developed by DOL and sent to OMB in February 2006 be obtained and reviewed. We understand there are approximately 8 binders at DOL and nearly that many at HHS. We also recommend that EEOICPA be amended to give Congress the authority to appoint the Advisory Board and to adopt the provisions included in the Energy Employees Occupational Illness Compensation Program Improvement Act of 2006 (HR 5840); to modify the appeals process in DOL to ensure its independence; to strengthen conflict of interest provisions and penalties; and to provide the Advisory Board and its audit contractor with the legal authority to have full and unfettered access to all records in the control of HHS which the Board and the contractor deem necessary to carry out their functions, consistent with national security laws and the Privacy Act.